

**STATE OF MICHIGAN**

**COURT OF APPEALS**

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CAROLE ANN MACRO,

Plaintiff/Appellant/Cross-Appellee,

v

TWELVE MILE & RYAN SHELL, INC.,

Defendant/Appellee/Cross-Appellant,

and

MICHAEL ALLEN LUPAN,

Defendant/Appellee.

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Before: Fitzgerald, P.J., and Wahls and Saad, JJ.

PER CURIAM.

Defendant Michael Allen Lupan was on an errand for his employer, defendant Twelve Mile & Ryan Shell (Shell), when he collided with a car driven by plaintiff Carole Ann Macro. Macro sued, and a jury determined that she suffered \$40,000 economic loss and \$50,000 noneconomic loss, but was fifty percent responsible for the accident. The trial court reduced her judgment to present value, awarding her \$16,021.58 for economic loss and \$17,237.70 for noneconomic loss. In addition, the court awarded Shell mediation sanctions of \$41,346.25 for attorney fees and \$3,133.15 for costs.

Macro appealed as of right the trial court's order reducing the judgment to present value, the order awarding Shell mediation sanctions, and the order denying her motion for a mistrial. Shell cross-appealed as of right the trial judgment for Macro. This Court held that Macro was denied a fair trial by an improper question which defense counsel asked one of her physicians, Dr. Richard Alan Jankowiak. *Macro v Twelve Mile & Ryan Shell*, unpublished opinion per curiam of the Court of Appeals, issued 2/15/96 (Docket Nos. 150198; 157847). This Court affirmed the judgment as to liability and comparative negligence, but remanded as to the issue of damages. *Id.* Additionally, this Court held that the trial court did not err either in reducing the jury award to present value, or in awarding mediation sanctions to Shell. *Id.* Finally, in Shell's cross-appeal, this Court held that the trial court did not abuse its discretion in limiting

defendants' cross-examination of Jankowiak.

Shell appealed this Court's decision to the Michigan Supreme Court. In lieu of granting leave to appeal, the Supreme Court vacated this Court's judgment and remanded to this Court for reconsideration in light of *Wischmeyer v Schanz*, 449 Mich 469; 536 NW2d 760 (1995).

On cross-appeal, Shell argues that the trial court erred by limiting cross-examination. We agree in part, and disagree in part.

Following this automobile accident, Social Security referred Macro to Jankowiak for a disability evaluation. Jankowiak testified that Macro was suffering from "extreme depression, feelings of worsening, helplessness and hopelessness and desperation, suicide ideations, problems with sleeping, appetite, and inability to engage in general life functions." In addition, Jankowiak testified that Macro was suffering from a "generalized slowing of the cognitive function." He doubted that she would ever be able to return to work.

On cross-examination, counsel for Shell asked Jankowiak the following question:

Isn't it true, Doctor, that you had your license – your license to practice medicine summarily revoked by the Michigan State Licensing and Regulations Board because on February 3, 1981, the Oakland County Circuit Court found that you were not legally sane at the time you sold or participated in the sale of cocaine to an undercover officer and that you were found guilty [sic] by reason of insanity; isn't that true?

Macro's counsel immediately asked that the jury be excused, and argued that the cocaine incident was irrelevant and inflammatory. The trial court initially ruled that defense counsel could question Jankowiak about the period in which his license was suspended and whether he practiced during that period, but not about the insanity verdict. Later, after allowing defense counsel to question Jankowiak out of the presence of the jury, the trial court ruled that questions as to whether Jankowiak had practiced without a license also would not be allowed. The trial court denied Macro's motion for a mistrial, and instructed the jury that it was not to draw any inference from defense counsel's question.

Here, the question posed by defense counsel and the trial court's ruling limiting cross-examination has three distinct segments. First, the question asked whether Jankowiak's medical license had been revoked. Second, the question asked whether he had been on trial for participating in the sale of cocaine. Third, the question asked whether he had been found not guilty by reason of insanity. Because each of these questions requires a slightly different legal analysis, we address them separately.

Rule 611(b) of the Michigan Rules of Evidence states:

A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. The judge may limit cross-examination with respect to matters not testified to on direct examination.

A broad range of evidence may be elicited on cross-examination for the purpose of discrediting a witness. *Wischmeyer, supra*, p 474. The scope and duration of cross-examination is in the trial court's discretion. *Id.* An appellate Court will not reverse absent a clear showing of abuse. *Id.*, pp 474-475.

The trial judge is charged with overseeing attacks on an expert's credibility. *Id.*, p 475. Questions seeking to elicit evidence indicating bias, prejudice or interest and inconsistent testimony or statements must not be unduly limited or improvidently extended. *Id.* The trial judge must also be alert to questions which harass, intimidate or belittle a witness. *Id.* However, when a case turns on the testimony of one expert compared with that of another, the credibility of each expert is relevant to the disposition of the case. *Id.* The credibility of a medical expert, therefore, is relevant to the disposition of a medical malpractice case and evidence of an expert's credibility generally is admissible unless its probative value is substantially outweighed by the danger of unfair prejudice. *Id.*

We hold that the trial court erred by limiting cross-examination as to the period of time during which Jankowiak's license was suspended. On direct examination, Jankowiak testified that he completed an internal medicine internship at Henry Ford Hospital in 1977, "went out and practiced for a while," and returned to Henry Ford Hospital in 1981 to take a four-year residency in psychiatry. He also testified that he had been in private practice since May, 1985.

In reality, Jankowiak's license had been suspended from July 1, 1980, through June 30, 1982. Defense counsel's question sought evidence contradicting Jankowiak's testimony that he had merely taken time off for traveling. The trial court's ruling unduly limited this question seeking inconsistent testimony. *Wischmeyer, supra*, p 475. In addition, gaps or weaknesses in a witness' expertise are a fit subject for cross-examination, and go to the weight of testimony, not its admissibility. *Id.*, p 480. It was imperative that opposing counsel be afforded the opportunity to cross-examine Jankowiak to expose the weaknesses in his knowledge, skill, experience, training, or education. *Id.* This includes not only questions about the alleged revocation of his medical license, but also questions involving his professional conduct during the time of any suspension. As in *Wischmeyer*, the probative value of questioning Jankowiak concerning his competency to practice medicine was not substantially outweighed by the danger of unfair prejudice. *Id.*, pp 480-481. Accordingly, the trial court abused its discretion in limiting this aspect of cross-examination.

The trial court did not abuse its discretion in disallowing the part of the question dealing with whether Jankowiak had been on trial for the sale of cocaine. Unlike questions as to whether he was licensed to practice medicine, questions as to whether Jankowiak was involved in the sale of cocaine were not probative of his truthfulness under MRE 608 or relevant to his competency or knowledge.<sup>1</sup> *Wischmeyer, supra*, p 482; see *People v Allen*, 442 Mich 558, 610; 420 NW2d 499 (1988).

Finally, we believe that the part of the question seeking evidence that Jankowiak was found to be not guilty by reason of insanity was relevant to his medical competency and knowledge. As such, it affected Jankowiak's credibility. However, the length of time which had passed between that trial and this trial diminished the probative value of this inquiry. Moreover, unlike the evidence of his suspension, this evidence did not directly contradict Jankowiak's direct testimony. Finally, it would have been difficult to inquire into the fact that a trial ended in a verdict of not guilty by reason of insanity without any mention of what the trial concerned. The stigma attached to an individual's association with narcotics is widely recognized. *Gainey v Sieloff (On Remand)*, 163 Mich App 538, 549; 415 NW2d 268 (1987). Keeping in mind that this Court will not reverse absent a clear showing of abuse of discretion, we hold that the trial court did not abuse its discretion in determining that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. MRE 403; *Wischmeyer, supra*, pp 480-481.

Error requiring reversal may not be predicated upon a ruling that admits evidence unless a substantial right was affected. MIRE 103(a); *Chmielewski v Xermac, Inc*, 216 Mich App 707, 710-711; \_NW2d\_(1996). Unlike the witness in *Wischmeyer, supra*, p 482, the witness here was not thoroughly discredited by the end of cross-examination. In addition, the error in limiting defendants' cross-examination of Jankowiak not only prevented defendants from questioning the competency of Jankowiak, it disallowed an inquiry which would have directly impeached his veracity. Because substantial rights of defendants were affected, we find it necessary to remand for a new trial.

Because of our disposition of this issue, it is unnecessary to address Macro's argument that the trial court abused its discretion in denying her motion for mistrial. However, we caution defense counsel to avoid any mention that Jankowiak was charged with the sale of cocaine or that he was found not guilty by reason of insanity. Because we reverse the jury verdict, we also vacate the trial court's order awarding mediation sanctions. MCR 2.403(O)(2). In addition, Macro's argument concerning the reduction of the judgment to present value is moot.

Upon remand, questions involving the alleged revocation of Jankowiak's medical license should be allowed during cross-examination. Similarly, questions should be allowed concerning Jankowiak's professional conduct during the time of suspension. However, no questions should be allowed concerning the allegation that Jankowiak was arrested and tried for a cocaine offense. In addition, no questions should be allowed concerning the allegation that a jury found him not guilty by reason of insanity.

Reversed and remanded for proceedings consistent with this opinion.

/s/ E. Thomas Fitzgerald  
/s/ Myron H. Wahls  
/s/ Henry William Saad

<sup>1</sup> We do not suggest that opposing counsel may never inquire into the reason for the professional suspension of an expert witness.